

Appendix D

UNIVERSITY OF NOTRE DAME RESOLUTION LETTER

June 30, 2011

The Reverend John I. Jenkins, C.S.C.
President
University of Notre Dame
400 Main Building
Notre Dame, Indiana 46556

Re: OCR Sexual Harassment Investigation

Dear Rev. Jenkins:

This letter is to advise you of the resolution of the investigation initiated on December 3, 2010, by the U.S. Department of Education, Office for Civil Rights (OCR), of the University of Notre Dame (the University). The investigation was conducted under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §1681, and its implementing regulation, 34 C.F.R. Part 106. Title IX prohibits discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. As a recipient of Federal financial assistance from the Department, the University is subject to Title IX.

The regulation implementing Title IX, at 34 C.F.R. §106.71, incorporates by reference the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §2000d, including 34 C.F.R. §100.7(c). The Title VI regulation, at 34 C.F.R. §100.7(c), provides that OCR will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with the laws enforced by OCR. The investigation will include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with the regulations occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with the laws enforced by OCR.

Pursuant to its authority under 34 C.F.R. §100.7(c), OCR initiated this investigation to examine the University's policies and procedures relating to student-on-student (peer) sexual harassment and the University's implementation of those policies and procedures.¹

¹ OCR's investigation was not based on a pending complaint filed with OCR. Accordingly, OCR's investigation did not address whether the University's responses to any specific reports or complaints of sexual harassment were in compliance with Title IX and its implementing regulation.

The University is located in Notre Dame, Indiana. The University enrolls approximately 11,816 students, including 8,372 undergraduate students; 46.2% of the University's students are women.

The Title IX regulation, at 34 C.F.R. §106.31(a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity operated by a recipient.

Sexual harassment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the recipient's program.² A single instance of rape is sufficiently severe to create a hostile environment.

If a recipient knows or reasonably should have known about sexual harassment that creates a hostile environment, Title IX requires the recipient to take immediate action to eliminate the harassment, prevent its recurrence and address its effects. When responding to alleged sexual harassment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation reveals that discriminatory harassment has occurred, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. These duties are a recipient's responsibility, regardless of whether a student has complained, asked the recipient to take action, or identified the harassment as a form of discrimination. A law enforcement investigation does not relieve the recipient of its independent Title IX obligation to investigate the conduct. A recipient should not wait for the conclusion of a criminal investigation or criminal proceeding to conduct its own Title IX investigation, and if needed, must take immediate steps to protect the complainant from further harassment prior to the completion of the Title IX investigation/resolution. Appropriate steps may include separating the accused harasser and the complainant, providing counseling for the complainant and/or harasser, and/or taking disciplinary action against the harasser.

To comply with these regulatory requirements, recipients need to recognize and respond to sexual harassment of students by teachers and other employees, by other students, and by third parties. The Title IX regulation, at 34 C.F.R. §106.8(a), specifically requires that a recipient designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX, including any investigation of any complaint communicated to it alleging noncompliance with Title IX (including allegations that the recipient failed to respond

² The applicable legal standards described herein are more fully discussed in OCR's 2011 Dear Colleague letter on Sexual Violence, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (April 4, 2011). See also OCR's 2010 Dear Colleague letter on Harassment and Bullying, which is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (October 26, 2010), and OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001) at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

adequately to sexual harassment). This provision further requires that the recipient notify all its students and employees of the name (or title), email and office address and telephone number of the employee (or employees) so designated. The recipient must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. Further the Title IX regulation, at 34 C.F.R. §106.9, requires recipients to notify all parties that it does not discriminate on the basis of sex in the educational program or activity that it operates and that it is required by Title IX not to discriminate in such a manner. The notice should further state that the requirement not to discriminate in the recipient's education program or activity extends to employees as well as students and that inquiries concerning the application of Title IX may be referred to the Title IX Coordinator or employee designated pursuant to 34 C.F.R. §106.8(a).

The Title IX regulation, at 34 C.F.R. §106.8(b), requires a recipient to adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by the regulation. Title IX does not require a recipient to provide separate grievance procedures for sexual harassment complaints, including sexual violence complaints. A recipient may use student disciplinary or other separate procedures for these complaints. However, any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary proceedings, must afford the complainant a prompt and equitable resolution.

In evaluating whether a recipient's grievance procedures are prompt and equitable, OCR considers whether the procedures provide for: notice to students and employees of the procedures, including where complaints may be filed; application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for the major stages of the complaint process; written notice to the parties of the outcome of the complaint and any appeal; and an assurance that the recipient will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate. Throughout the recipient's investigation and in any hearing, both parties must have equal opportunity to present relevant witnesses and other evidence. Also, in order for a recipient's grievance procedures to be consistent with the Title IX evidentiary standard, the recipient must use a preponderance of the evidence standard. If a recipient provides for appeal of the findings or remedy, it must do so for both parties. The recipient must maintain documentation of all proceedings.

In its April 2011 Dear Colleague letter on Sexual Violence, OCR noted that compliance with Title IX, such as publishing a notice of non-discrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing procedures, can serve as preventive measures against sexual harassment.³ These measures, combined with education and training,

³ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

can help ensure that all students and employees recognize the nature of sexual harassment and sexual violence and understand that the recipient will not tolerate such behavior.

As part of OCR's investigation of the University, OCR staff conducted on-site visits to the University in December 2010 and January and April 2011. During these visits, OCR interviewed numerous University officials as well as officials from St. Mary's College, which is a women's college.⁴ OCR also conducted telephone interviews of Notre Dame staff members who were unavailable during the on-site visits. At both campuses, OCR reviewed files concerning sexual assault and sexual misconduct complaints filed against Notre Dame students. OCR also spoke with other individuals familiar with the University's handling of sexual harassment complaints and reviewed sexual harassment complaint files. Finally, OCR reviewed press reports concerning sexual harassment complaints against the University, information in its case files and files and historical data relating to reports made about the University under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. §1092(f).

OCR's investigation included an extensive review of the relevant University policies and procedures relating to peer sexual harassment. The University's Student Handbook ("*du Lac*") sets forth the University's commitment to having a campus environment free from all discrimination on the basis of sex and includes and/or references related policies and procedures, including the University's "Standards of Conduct and Disciplinary Procedure" (Code), "Sexual Harassment Policy and Reporting Procedures" (Procedures), "Discriminatory Harassment Policy," and "Title IX Grievance Policy and Procedures."⁵ Because *du Lac* is distributed through the University's website and at various locations throughout the campus, the University's sexual harassment policies and procedures are widely available for students and staff. The Code describes the University's general standards of conduct and disciplinary procedures, and includes a specific section on "Sexual Assault and Sexual Misconduct" that provides examples of the prohibited types of behavior. The Code specifically encourages students to immediately report incidents of discrimination on the basis of sex, explains how to report sexual misconduct and sexual assault and provides general contact information for employees responsible for receiving and/or investigating reports of sexual misconduct or sexual assault. The Code makes clear that the University will conduct an investigation of every complaint or other report of sexual misconduct or sexual assault.

The Code and Procedures describe the disciplinary process used by the University to investigate and address sexual assault or sexual misconduct. The Code states that as a general rule, the University's disciplinary process will proceed normally during the pendency of a criminal investigation and/or proceeding. Although no time frame is provided in the applicable Code

⁴ St. Mary's College is located across the street from the University. While there is no legal relationship between the institutions, St. Mary's students can enroll in classes, join student groups/organizations and participate in campus activities at the University and University students can take classes at St. Mary's.

⁵ "*Du Lac: A Guide to Student Life, University of Notre Dame 2010-11*," at <http://orlh.nd.edu/dulac/duLac.pdf>. OCR noted that, in light of recent media coverage of a sexual harassment report to the University, the University issued a widely-publicized statement on December 16, 2010 stating that "sexual violence is unacceptable and will not be tolerated at Notre Dame."

provisions, the Procedures state that in response to most reports of sexual harassment the disciplinary procedure will be completed within thirty (30) days (business). The Code also includes a process for notifying the complainant when the disciplinary process will take longer and when the University expects the process to be completed.

Du Lac includes a Title IX nondiscrimination policy stating that the University does not discriminate on the basis of sex in the educational program or activity that it operates. The University also includes similar nondiscrimination statements in other published policies. The University's documents further indicate that inquiries concerning the application of Title IX may be referred to the identified Title IX Coordinators.

The University has taken a number of preventive measures against sexual harassment, including education and training. The University has a campus coalition, the Committee on Sexual Assault Prevention (CSAP), which serves as the coordinating body for various University departments charged with addressing sexual violence, sponsoring rape education/prevention initiatives, and ensuring resources are in place for complainants. Members of CSAP include University faculty and staff, University Security Officers (who are all sworn police officers), student leaders and St. Mary's College personnel.

The University provided information to OCR indicating that all new University students are required to attend sexual violence prevention programs during orientation. The orientation program includes a review of the University's policies and procedures relating to sexual harassment, the contact information for reporting sexual harassment, and resources, including counseling, health, and mental health services, and information available through CSAP. The University also provides annual training to all University staff involved in processing, investigating and/or resolving complaints or other reports of sexual harassment, including an overview of Title IX and the University's sexual harassment policies and procedures. The orientation and training programs are intended to reinforce the University's commitment to addressing and preventing sexual harassment and to help ensure that students and University staff understand what types of conduct constitute sexual harassment, can identify warning signals that may need attention, and know how to respond.

Through its education program and published policies and procedures, the University has taken steps to encourage students and staff to report incidents of sexual misconduct and sexual assault to the appropriate University and law enforcement authorities. To further encourage reporting, the University's procedures provide that students who report sexual misconduct and/or sexual assault will not be subjected to disciplinary action for violating other provisions of the disciplinary code (*e.g.*, alcohol violations) or be subjected to questioning concerning past unrelated sexual relationships.

While, as noted, the University's sexual harassment policies and procedures are widely available, OCR's investigation found that students and University staff were not always clearly instructed as to the processes that would be followed after a report of sexual misconduct or sexual assault was made to the University. For example, the evidence suggested that complainants were not

specifically advised that they could pursue the University's disciplinary process at the same time as pursuing a criminal complaint with the appropriate law enforcement agency. OCR's investigation also noted that the University's policies and procedures related to sexual harassment and nondiscrimination were described in numerous University policies and documents, including in the policies and procedures cited in *du Lac*, and that this was a source of confusion. These policies are not consolidated and were somewhat inconsistent, particularly in identifying appropriate complaint recipients. OCR's investigation revealed several occasions in which the University's investigation of a report of sexual misconduct or sexual assault was delayed in excess of 60 calendar days pending the conclusion of a criminal investigation. OCR's investigation further revealed that while the University routinely uses a "preponderance of the evidence" standard for its sexual harassment investigations, the University's written procedures do not specify that this is the evidentiary standard it uses.

Prior to the conclusion of OCR's investigation, the University indicated its willingness to improve and clarify its policies and procedures, and their implementation, relating to peer sexual harassment of students by entering into a voluntary resolution agreement with OCR. The University specifically expressed interest in ensuring that its policies and procedures comport with OCR's 2011 Dear Colleague letter on Sexual Violence.⁶ The Department issued the Dear Colleague letter in April 2011, to explain that the requirements of Title IX cover sexual violence and to remind recipients of their responsibilities to respond to sexual violence in accordance with the requirements of Title IX.

Subsequent discussions with the University resulted in the University signing the enclosed Settlement Agreement (Agreement) which, when fully implemented, will resolve the issues raised in the investigation. The provisions of the Agreement are consistent with the applicable regulations and information obtained during the investigation. As a result of the Agreement, OCR is not making any compliance determinations under Title IX regarding the issues investigated by OCR and addressed by the Agreement.

Under the provisions of the Agreement, the University has committed to improving its policies and procedures relating to sexual harassment, and their implementation, to investigating promptly all incidents of sexual harassment of which it has notice, to taking appropriate disciplinary action against students and others who violate University policy and procedures addressing sexual harassment, and to taking prompt and effective action to end sexual harassment and prevent its recurrence. The Agreement requires the University to make clearer to students and the public how to report sexual harassment and what to expect from the University and law enforcement after making a report. The University will make changes to its current sexual harassment policies and procedures to further these objectives. The revised policies and procedures will clearly state that the University uses a "preponderance of evidence" legal standard to evaluate allegations of sexual harassment. The University will clearly delineate the options available to students who report sexual harassment, the specific steps the University will take in its investigations, the interim and permanent steps the University will take to stop and/or remedy the harassment, prevent its recurrence and minimize the burden to the complainant's

⁶ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

educational program, the resources and services available to complainants, accused students and witnesses, and the provision to both parties of the equivalent opportunity to provide evidence, and equivalent notice of the process, access to peer support, information about the procedures and written notice of the outcome. The University also agreed to conclude its Title IX sexual harassment investigations within sixty (60) calendar days, except in extraordinary circumstances. This timeframe is intended to ensure that, except in extraordinary circumstances, the entire process, including any police investigation, University investigation and/or disciplinary hearing, even in cases where a criminal complaint is pending, is completed within 60 calendar days. The University further agreed to provide for alternative arrangements for complainants who do not want to be present in the same room as the accused during the disciplinary hearing, and to allow the complainant to appeal a disciplinary decision on the same grounds as provided for the accused. The University also agreed to review its written policies and procedures relating to sexual harassment to determine whether they can be consolidated to provide a more efficient resource for students, faculty and staff.

OCR recognizes that policies and procedures alone are not sufficient to ensure that students feel comfortable complaining about sexual harassment and sexual misconduct and confident that a university will respond appropriately. The agreement specifically requires the University to work with CSAP to continue to assess the campus environment and make recommendations for improving the University's responses to sexual harassment. The agreement also requires the University to continue to provide training to University personnel and new students about its policies and procedures relating to sexual harassment and the resources and services available for students who believe they have been harassed. Finally, the agreement requires the University to publish a notice in its student newspaper, *The Observer*, inviting those students who have reported alleged sexual misconduct or otherwise believe they have been subjected to sexual misconduct on campus to provide to CSAP recommendations regarding ways to improve the effectiveness of the University's implementation of its sexual harassment policies and procedures. Finally, the University will develop, and provide to complainants, written materials that summarize the complainant's rights under Title IX and the University's sexual harassment policies and procedures.

OCR will monitor the University's implementation of the Agreement. We look forward to receiving the University's first report by July 15, 2011. OCR will not close the monitoring of this Agreement until OCR determines that the University has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Title IX, at 34 C.F.R. §§106.8, 106.9, and 106.31, which were at issue in this investigation.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Thank you for the courtesy and cooperation that you and your staff extended to OCR during the investigation. In particular, we would like to thank Ms. Marianne Corr and Ms. Claire Konopa Aigotti, Counsel for the University.

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If you have any questions regarding this letter, you may contact me or Ms. Adele Rapport, OCR Chicago Office, Chief Attorney, at 312-730-1495.

Sincerely,

/S/

Debbie Osgood
Director, Chicago Office

Enclosure

cc: Marianne Corr
Vice President and General Counsel

Claire Konopa Aigotti
Associate General Counsel